MALAYSIAN REPORTS

RE NATIONAL UNION OF COMMERCIAL WORKERS; WONG YOON LEONG & ORS. v. S. BALASINGAM & ORS.

[O.C.J. (Mohamed Azmi J.) November 17, 1973]
[Kuala Lumpur — Originating Summons No. 414 of 1973]

Trade Union — Right of union members to sue — Resolution whether ultra vires — Jurisdiction of court — Exhaustion of domestic remedies.

Practice & Procedure — Action by means of originating summons whether correct form — R.S.C. 1957, O.55 r.3.

This was an action for a declaration by certain members of a union that the respondents — the National Executive Council of the union — acted *ultra vires* the rules and constitution of the union. At the commencement of the trial certain preliminary points were raised:

(1) that the applicants should have exhausted all domestic remedies as provided in the Union's Constitution before taking the dispute to court;

(2) the applicants should have commenced their action by writ and not by means of an Originating Summons; and

(3) the union should have been joined as a party.

Held: (1) following *Kolandaisamy* v. *Annamalai & The Harbour Trade (Selangor) Port Swettenham*[2] and *Muthuraku* v. *Kuala Lumpur Municipality Workers Trade Union*,[3] the dispute in this case should have been referred to arbitration in accordance with the Rules and Constitution of the union before it was brought to court;

(2) as the present case involved the determination of serious questions of fact, it did not come within the ambit of Order 55 r.3 of the Rules of the Supreme Court, 1957 i.e. the action should not have been commenced by means of an originating summons;

(3) failure to join the union as a party was not fatal to the present application.

Application dismissed with costs.

Cases referred to:-

(1) *Tharmalingam* v. *Sambanthan* [1961] M.L.J. 63.

(2) *Kolandaisamy* v. *Annamalai & The Harbour Trade Union (Selangor) Port Swettenham* [1968] 1 M.L.J. 222.

(3) *Muthuraku* v. *Kuala Lumpur Municipality Workers Trade Union* [1973] 1 M.L.J. 206, F.C.

(4) *Abdul Majid* v. *Haji Abdul Razak* [1971] 2 M.L.J. 228 & 229.

Authorities cited other than those mentioned in the Judgment: (1) *Seaward & Ors.* v. *Paterson* [1895-9] All E.R. Rep. 1127 C.A.; (2) *Myers* v. *Elman* [1939] 4 All E.R. 484 H.L.; (3) *Lawlor & Ors.* v. *Union of Post Office Workers* [1965] 1 All E.R. 353; (4) *Barnard & Ors.* v. *National Dock Labour Board & Ors.* [1952] 2 All E.R. 424; (5) *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 All E.R. 1175 C.A.; (6) *Re Davstone Estates Ltd.'s Leases* v. *O'Dell & Ors.* [1969] 2 All E.R. 849; (7) *Leigh* v. *National Union of Railwaymen & Anor.* [1969] 3 All E.R. 1249; (8) *John* v. *Rees & Ors.* [1970] 1 Ch. 345; (9) *Enderby Town Football Club Ltd.* v. *The Football Association Ltd. & Anor.* [1971] 1 All E.R. 215 C.A.; (10) *Howard* v. *Bodington* (1877) 2 P.D. 203; (11) *Andrews* v. *Mitchell* [1904-1907] All E.R. Rep. 599 H.L.; (12) *Wayman* v. *Perseverance Lodge of the Cambridgeshire Order of United Brethren Friendly Society* [1917] 1 K.B. 677; (13) *Wellard* v. *National Union of Printing Workers*, The Times 26-27 May, 1938; (14) *Hiles* v. *Amalgamated Society of Woodworkers* [1967] 3 All E.R. 70; (15) *White & Ors.* v. *Kuzych* [1951] 2 All E.R. 435 P.C.; (16) *Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] 3 All E.R. 621 P.C.; (17) *McEllistrim* v. *Ballymacelligott Co-operative Agricultural & Dairy Society* [1919] A.C. 548; (18) *Ong Yok Chu & Anor.* v. *Yong Teck Fong & Anor.* [1960] M.L.J. 292; (19) *Heard* v. *Pickthorne & Ors.* [1913] 3 K.B. 299; (20) *In re Tottenham* [1896] 1 Ch. 628; (21) *In re Braybrook* [1916] W.N. 74; (22) *Muthuraku* v. *Kuala Lumpur Workers Trade Union* [1972] 1 M.L.J. 165.

ORIGINATING SUMMONS.

Wong Weng Kwai for applicants.

D. P. Xavier for respondents.

Mohamed Azmi J.: This is an application by Originating Summons by five members of the National Union of Commercial Workers, Malaysia, for a declaration that the resolution made on September 16, 1973 by the sixteen respondents as the National Executive Council of the Union postponing the biennial delegates conference beyond September 30, 1973 contravenes and is ultra vires rule 9 of the Rules and Constitution of the Union. They also prayed for a mandatory injunction to order and command the respondents that they as the National Executive Council of the Union do convene an extraordinary delegates conference in accordance with rule 10 of the Union's Constitution within fourteen days, and also for an order that the election of the principal officers be held at the said extraordinary delegates conference.

Under rule 9(1) of the Union's Constitution, it is provided that the biennial delegates conference of the Union shall be convened as soon as possible after March 31 and not later than September 30 every alternate year. At the emergency meeting of the Union's Executive Council held on September 16, 1973 it was resolved to postpone the biennial delegates conference to a date not later than January 31, 1974. From annexure "NUCW 4", it is apparent that except for one member who abstained the resolution was passed unanimously, and it is apparent that the resolution was passed pursuant to rule 10(6) of the Union's Constitution which provides that if a biennial delegates conference cannot be held by the date specified in rule 9 an extraordinary delegates conference shall have the power to perform any or all of the functions that are normally performed by a biennial delegates conference. Thus, purporting to act under the provisions of rule 10(6), the Executive Council postponed the 1973 biennial delegates conference to a date not later than January 31, 1974. Clearly, there is no power to postpone a biennial delegates conference under rule 10(6), but the Executive Council has power under that sub-rule to convene an extraordinary delegates conference if a biennial delegates conference cannot be held by September 30 as specified in rule 9. Such extraordinary delegates conference can perform all the functions that are normally performed by a biennial delegates conference which under rule 9(12) includes election of the principal officers of the Union. From the further affidavit of Mr. Vasagam, the fourteenth respondent who is the General Secretary of the Union, sworn on November 15, 1973, the Executive Council has since fixed the biennial delegates conference to December 15 and 16, 1973. (See annexure "V2").

At the commencement of the trial, however, counsel for ten of the respondents, viz. respondent Nos. 2, 4, 5, 7, 8, 9, 11, 13, 14 and 16, raised a number of preliminary objections. Despite objections by counsel for the applicants, I rule that those preliminary objections be heard first. There are three preliminary objections raised. Firstly, it is submitted that the applicants should have exhausted all the domestic remedies as provided in the Union's Constitution before

taking the dispute to court. Secondly, it is submitted that the applicants should have commenced this action by writ and not by Originating Summons in view of the fact that the present case is in effect a representative action where all the eleven thousand members of the Union are affected. Thirdly, it is submitted that the Union should have been joined as a party and that the sixteen respondents should not have been sued in their personal capacities.

On the question of jurisdiction, in *Tharmalingam* v. *Sambanthan*[1] the appellant who was an ordinary member of the Malayan Indian Congress asked for a declaration that his suspension from membership under Article 28 of the Malayan Indian Congress Constitution was null and void and for an injunction to restrain the defendant who was the President of the Malayan Indian Congress from preventing him from exercising his rights and privileges as a member of the political party and for damages. Dismissing the appeal, it was held by the appellate court affirming the decision of Ong J. (as he then was) that it was a condition precedent that the appellant should resort to the domestic remedies provided before resorting to courts. That was a case involving a political party, but the same rule also applies to trade unions as was held by Gill J. (as he then was) in *Kolandaisamy* v. *Annamalai & The Harbour Trade Union (Selangor) Port Swettenham.*[2] In that case, it was held that where there had been a dispute between a member of the union and the union and where the rules of the union provided that any dispute between a member and the union should be decided by reference to arbitration, the only way in which such dispute could come before the High Court was by way of a case stated for its opinion on any question of law as provided under section 45 of the Trade Union Ordinance. It was therefore held that the court has no jurisdiction to hear and adjudicate. *Kolandaisamy's* case was considered with approval by the Federal Court in *Muthuraku* v. *Kuala Lumpur Municipality Workers Trade Union.*[3] In the course of his judgment at page 207, Ong C.J. said:

"Unfortunately, in *Kolandaisamy's* case, perusal of the judgment did not disclose the material fact — which was expressly pleaded by the union in its defence — that there was in existence a panel of arbitrators, appointed pursuant to sub-rule (2) of rule 26, which was ready and available to determine the dispute when it arose. In the instant case, however, there was no such panel of arbitrators and it was common ground, as the judge pointed out, that arbitration was out of the question. Herein lies the essential difference between these two cases and the reason why we have allowed this appeal. Quite apart from the ratio decidendi stated by Gill J. (as he then was) at page 224, Kolandaisamy was bound by the rules of the union to resort to the domestic forum before seeking relief in court, so that, equally well, on the authority of *Tharmalingam* v. *Sambanthan*,[1] it was right that the court should disclaim any jurisdiction in the matter."

In the present case, rule 26 of the Union is in similar terms with rule 26 in *Kolandaisamy's* case as well as in Muthuraku's case. The relevant portion of rule 26(1) of the Union's Constitution reads:

"Every dispute between —

(a) a member or person claiming through a member or under the Rules, on the one part and the Union or any Branch thereof or an officer thereof, on the other part; or

(b) ....
(c) ....
(d) ....

shall be decided by reference to arbitration."

From the very nature of the declaration sought in this case, I am satisfied there is a dispute between the applicants, who are members of the Union on the one part, and the officers of the Union — the respondents — on the other part, as to whether the resolution passed by the respondents postponing the biennial delegates conference beyond September 30, 1973 contravenes and is *ultra vires* rule 9 of the Union's Constitution; and, as such, on the authorities cited above, I hold that the dispute shall first be decided by reference to arbitration before it is brought to the High Court. Under the circumstances, it is premature for this court to hear and adjudicate the present dispute. The only relevant issue raised by counsel for the applicants is whether there is in existence a panel of arbitrators appointed pursuant to rule 26(2) which is ready and available to determine the present dispute. Rule 26(2) states:

"A panel of 5 members who are not members of a Branch Committee or the Executive Council shall be appointed by the Biennial Delegates Conference and any vacancy or vacancies shall be filled as a subsequent delegates conference. Only one member may be appointed to the panel from any one Branch.

The complaining party to the dispute or a person appointed by him shall draw three names from the panel of arbitrators by lot in the usual manner and the three arbitrators whose names are first drawn shall decide the dispute provided always that an arbitrator from a Branch shall not serve if the dispute concerns a member of his Branch and another arbitrator shall be drawn to make up the required number."

From paragraph 3 of Mr. Vasagam's further affidavit, it is stated that at the meeting of the biennial delegates conference held on September 25 and 26, 1971 five persons were elected to the panel of arbitrators to hear any dispute under rule 26 of the Constitution of the Union, namely —

(a) Khoo Teng Kok
(b) Voon Kee Sah
(c) Ronnie Teh
(d) Edward Loh
(e) A. Sivanathan.

It is common ground that Mr. Khoo Teng Kok has since resigned. Of the four remaining arbitrators, it is contended on behalf of the applicants that both Mr. Edward Loh and Mr. A. Sivanathan are disqualified — thus leaving only two arbitrators; and, as such, there is insufficient arbitrators to form a quorum to which the present dispute can be referred to. It is true that paragraph 2 of rule 26(2) provides that the complaining party to the dispute or a person appointed by him shall draw three names from the panel or arbitrators by lot in the usual manner and the three arbitrators whose names are first drawn shall decide the dispute provided always that an arbitrator from a Branch shall not serve if the dispute concerns a member of his Branch, and another arbitrator shall be drawn to make up the required number. The crux of the matter, therefore, is whether Mr. Khoo Teng Kok and Mr. A. Sivanathan are disqualified to serve as arbitrators. It is true that Mr. Edward Loh, the third respondent, is a member of the Executive Council. It is equally true that Mr. A. Sivanathan is a member of the Selangor Branch and that all the five applicants are members of the same Branch. However, there is no evidence adduced to show that when Mr. Edward Loh was appointed as

an arbitrator at the meeting of the biennial delegates conference held on September 25 and 26, 1971, he was then a member of the Executive Council. In the absence of such evidence, it is reasonable to infer that at the time of his appointment he was not a member of the Executive Council, and as such I rule that he is not disqualified. As regards Mr. A. Sivanathan, although he is a member of the Selangor Branch, the fact that the validity of the relevant resolution in this case affects the entire members of the Union, I do not think that he should be disqualified. It would be different if the dispute was confined between the Selangor Branch and the main body of the Union or the Executive Council. If the argument of applicants' counsel is upheld, it would mean that none of the arbitrators would be qualified to be arbitrators. Under the circumstances, it is my considered opinion that there is in existence a panel of arbitrators appointed pursuant to sub-rule (2) of rule 26 which is ready and available to determine the dispute which has arisen in this case. Accordingly, I uphold the first preliminary objection.

On the second preliminary objection that this action should have been commenced by writ and not by Originating Summons, I take into consideration the fact that the present case involves the determination of serious questions of facts. For instance, it has to be decided as an issue of fact whether by postponing the biennial delegates conference beyond September 30, 1973 and fixing it on December 15 and 16, 1973 the respondents in fact intended not to have a biennial delegates conference this year but intended to have an extraordinary delegates conference instead pursuant to rule 10(6) of the Union's Constitution having regard to annexure "NUCW 4". Secondly, it is also to be decided whether the respondents have no reasonable cause for not having the biennial delegates conference by the date specified in rule 9 as envisaged by rule 10(6). Since these facts cannot be determined on the affidavits filed, I am of the view that they can only be resolved by examination of witnesses. Having regard to the facts in issue, I do not think this case comes within the ambit of Order 55 Rule 3 of the Rules of the Supreme Court, which is generally intended for simple matters. (See judgment of Chang Min Tat J. in *Abdul Majid* v. *Haji Abdul Razak*[4]). It is true that the Rules of the Supreme Court 1957 do not list out the mode of commencement of action; and that with the exceptions of certain action which must be commenced by certain modes, the Rules of the Supreme Court are lax. Learned counsel for the applicants has referred to Order 28 Rule 7 of the English Rules of the Supreme Court (White Book 1966) which reads:

"(1) Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

(2) Where the court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.

(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

(4) Any reference in these rules to an action begun by writ shall, unless the context requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun."

That is absent in our Rules of the Supreme Court, but Mr. Wong submits that by virtue of our Order 72 Rule 2 that English rule is applicable here. With due respect, Order 72 Rule 2 refers to practice and procedure when the English Rules of the Supreme Court were adopted here, *i.e.* 1957 Rules of the Supreme Court. Under the circumstances, Order 28 Rule 7 of the new English Rules of the Supreme Court is not available in this country. I would therefore uphold the respondents' objection on the second ground.

As regards the third preliminary objection, I do not think that the failure to join the Union as a party is fatal to the present application. Although strictly speaking, the capacity of the various respondents ought to have been stated in the title, this matter has been covered in the joint affidavit of the applicants. In any event, such irregularity can always be cured by necessary amendments.

Since the first two preliminary objections have been upheld, I dismiss the application with costs.

Application dismissed.

Solicitors: *Mah-Kok & Din; Xavier & Vadiveloo.*

SHEIKH ABDULLAH BIN SHEIKH MOHAMED v. KANG KOCK SENG & ORS.

[O.C.J. (Syed Othman J.) November 30, 1973]
[Kuantan — Civil Suit No. 51 of 1970]

Practice and Procedure — Interrogatories delivered after close of pleadings — Trial commenced — Exceptional circumstances to be shown.

In an application for leave to serve interrogatories on the defendants after close of pleadings and after commencement of the trial exceptional circumstances must be shown. These circumstances must be of such a nature that the applicant could not have foreseen them after the exercise of due diligence.

Case referred to:-

(1) *Ellis* v. *Ambler* 36 T.L.R. 410.

CIVIL SUIT.

N. T. Rajah (*Balendran* with him) for the plaintiff.

P. Mooney (*C. Paramjothy* with him) for the defendants.

Syed Othman J.: In the action connected with this application the plaintiff alleges that on 6th January, 1970 the first defendant, banker and financier of the fifth defendant company, defrauded him into executing a power of attorney to deal with his interest in the company, an agreement selling and assigning absolutely